A **SYARIKAT POH KIM SENG (M) SDN BHD & ORS**

v.

CREDIT CORPORATION (MALAYSIA) BHD

B COURT OF APPEAL, MALAYSIA
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: S-02-192-1996]
C 5 SEPTEMBER 2006

CONTRACT: *Guarantee - Loan secured by charge and guarantee - Personal guarantees given by directors that they would liable for repayment in event of default by companies that received loan facilities - Denial of*
D *liability - Allegation of forgery - Whether proven and vitiated guarantees executed - Quantum - Evidence as to amount due and owing*

BANKING: *Securities for advances - Loan secured by charge and guarantee - Personal guarantees given by directors that they would liable for repayment in event of default by companies that received loan facilities*
E *- Denial of liability - Allegation of forgery - Whether proven and vitiated guarantees executed - Quantum - Evidence as to amount due and owing*

This appeal arose from a judgment delivered in four civil suits, which had been consolidated since the causes of action in all the
F four suits were identical. They arose from a common transaction involving the respondent, which had provided end finances of varying amounts to four family-related companies, *ie*, the 1st appellant, to enable them to purchase four warehouses cum offices. As securities for such loans, the properties purchased were
G charged to the respondent. Additionally, the respective directors of the respective companies also gave their personal guarantees that in the event the companies, as the principal debtors, defaulted in their obligations under the respective loan agreements, they would agree to be personally liable for the repayment of the respective
H loans to the respondent. The directors subsequently executed four separate guarantees and all the six directors were the other appellants in the present appeal. The appellants then denied liability for the sums claimed by the respondent by relying on the plea of forgery, claiming that such forgery had vitiated the
I guarantees they had executed. The learned trial judge found for

the respondent; hence, the present appeal. The appellants also attacked the judge's finding on the ground that the judge did his own calculations as to the quantum and not on the various amounts as agreed to by the parties.

Held (dismissing the appeal)
Per Siti Norma Yaakob JCA:

(1) On the facts, the findings of the learned judge were all findings of fact based on the evidence of the witnesses who testified before him. There was, therefore, no reason to interfere with his findings since they were well founded and justified under the circumstances of this case. The allegation of forgery had not been proven by the appellants and they, hence, could not absolve themselves from their liabilities as guarantors to the various loans that had been extended to the companies of which they were the directors. (para 12)

(2) In respect of the finding of the court below as to the amount due and owing by the appellants to the respondent, the objection of the appellants could not be correct as the learned judge had accepted the undisputed evidence of the respondent's credit manager ('PW5'). If indeed there had been a prior agreement between the parties as to the quantum, there was no necessity of calling PW5 to take the stand. The appellants did not object to PW5 being called as a witness and they must have agreed to the manner in which the various credits and debits were proved. In dealing with the appellants' conduct, the learned judge found that having so consented, they could not turn around to say that such evidence was inadmissible, and that, therefore, the respondent had proved the amount owed by the companies as there was no evidence to contradict the figures. There was nothing wrong with this reasoning and there was no reason to substitute it in any manner. (paras 13, 14 & 15)

Bahasa Malaysia *translation of headnotes*

Rayuan di sini berbangkit dari keputusan yang dibuat di dalam empat guaman sivil, yang telah disatukan kerana mengandungi kausa-kausa tindakan yang serupa. Ia berbangkit dari satu transaksi bersama yang melibatkan responden, yang memberi 'end finances' untuk beberapa jumlah tertentu kepada empat syarikat keluarga,

iaitu perayu pertama, bagi membolehkan mereka membeli empat gudang dan bangunan pejabat. Hartanah yang dibeli kemudian digadaikan kepada responden sebagai jaminan kepada pinjaman. Selain itu, pengarah keempat-empat syarikat juga memberi jaminan persendirian masing-masing, jika syarikat-syarikat selaku peminjam utama mungkir dalam obligasi mereka di bawah perjanjian-perjanjian pinjaman, iaitu bahawa mereka akan bertanggungan secara peribadi untuk membayar balik pinjaman kepada responden. Berikutnya pengarah-pengarah, di mana keenam-enam mereka adalah perayu-perayu yang lain di sini, memeterai empat gerenti yang berasingan. Bagaimanapun, perayu-perayu kemudian menolak liabiliti terhadap jumlah yang dituntut oleh responden atas alasan pemalsuan (forgery), dengan mendakwa bahawa pemalsuan tersebut telah menjadikan gerenti yang dimeterai mereka cacat. Perayu-perayu juga menyelar dapatan hakim, atas alasan bahawa hakim membuat pengiraannya sendiri berkaitan kuantum dan tidak bergantung kepada akaun-akaun yang sudah dipersetujui di antara pihak-pihak.

Diputuskan (menolak rayuan)
Oleh Siti Norma Yaakob HMR:

(1) Dapatan yang arif hakim adalah dapatan fakta yang dibuat berdasarkan keterangan saksi-saksi yang memberi keterangan di hadapan beliau. Dengan itu, tiada alasan untuk mengganggu dapatan-dapatan tersebut yang dalam halkeadaan yang wujud adalah kukuh dan berjustifikasi. Dakwaan pemalsuan tidak dibuktikan oleh perayu-perayu dan mereka, dengan itu, tidak boleh melepaskan diri mereka dari liabiliti sebagai penggerenti kepada pinjaman-pinjaman yang diberikan kepada syarikat-syarikat tersebut yang mana mereka merupakan pengarah-pengarahnya.

(2) Berhubung dapatan mahkamah di bawah berkaitan jumlah yang terhutang oleh perayu-perayu kepada responden, bantahan perayu-perayu adalah tidak berasas oleh kerana keterangan pengurus kredit responden ('PW5') yang tidak dicabar tersebut telah pun diterima oleh yang arif hakim. Sekiranya benar terdapat satu persetujuan terdahulu di antara pihak-pihak berhubung kuantum, tentulah tidak ada keperluan untuk memanggil PW5 untuk memberi keterangan. Perayu-perayu tidak membantah kepada pemanggilan PW5 sebagai saksi dan dengan itu bersetuju dengan cara pembuktian butiran-butiran

debit dan kredit tersebut. Dalam menangani tingkah laku perayu-perayu, yang arif hakim memutuskan bahawa disebabkan persetujuan tersebut mereka tidak boleh kemudiannya berpusing balik dan mengatakan bahawa keterangan-keterangan sedemikian tidak boleh diterima-masuk. Ini bermakna responden telah membuktikan jumlah yang terhutang oleh syarikat-syarikat disebabkan tiadanya keterangan yang menyangkal butiran-butiran berkenaan. Tiada salahnya dengan taakulan ini dan dengan itu tiada sebab untuk menggantikannya dengan apa cara sekalipun.

For the appellants - Lim Pitt Kong; M/s PK Lim & Co
For the respondent - Douglas Lind (Christopher Chong with him); M/s Skinner Lind Willie Wong & Chin

[Appeal from High Court, Kota Kinabalu; Civil Suit Nos: K 379-1988, K 380-1988, K 381-1988 & K 382-1988]

Reported by Suresh Nathan

JUDGMENT

Siti Norma Yaakob JCA:

[1] This appeal arose from a judgment delivered in four civil suits, which had been consolidated as the causes of action in all the four suits are identical as they arose from a common transaction. That common transaction involved Credit Corporation (Malaysia) Bhd, the respondents before us, providing end finances of varying amounts to the following four family related companies:

(1) Syarikat Poh Kim Seng (M) Sdn. Bhd.

(2) Perabot Kheng Seng (M) Sdn. Bhd.

(3) King Sing Supermarket Sdn. Bhd.

(4) Bumibaru (Malaysia) Sdn. Bhd.

("the companies") to enable the companies to purchase four warehouses cum offices.

[2] The companies are the 1st appellants before us and the 1st defendants in each of the four civil suits.

[3] As securities for such loans, the properties purchased were charged to the respondents and additionally the respective directors of the respective companies also gave their personal guarantees that in the event the companies, as the principal debtors, defaulted in their obligations under the respective loan agreements, they, the respective directors agree to be personally liable to repay the respective loans to the respondents. It is in respect of these guarantees that the present appeal before us are founded.

[4] Four separate guarantees were executed by the respective directors of the respective companies and all the six directors are family members, they being the father, the mother, the three sons and a daughter-in-law. All the guarantees are dated 7 February 1984, and the six guarantors are the other appellants before us.

[5] In the court below all the appellants deny liability for the sums claimed by the respondent. A number of defences have been pleaded by the guarantors in the respective civil suits but at the trial, these defences have been narrowed to the allegation that the signatures of Toh Kim Chuan, the father, and Ong Sen Tuan, the mother, appearing on two guarantees and that of Vun Nget Len, the sister-in-law appearing in one guarantee had been forged and they are absolved from any liability for the sums claimed by the respondents.

[6] Relying on that same forgery plea, the other guarantors, namely the three sons, also claim that such forgery had also vitiated the guarantees that they had executed.

[7] Based on these narrowed defences, Ian HC Chin, J posed the following three issues.

(1) Whether the signatures of the disputed guarantors namely the father, mother and sister-in-law appearing in the relevant guarantees are forgeries.

(2) If indeed their signatures had been forged, whether all the six guarantors are discharged of their liabilities.

(3) If liabilities have been established what are the amounts that are owing to the respondent.

[8] Although there is no direct evidence to show the due execution of the guarantees, it is not disputed that all the guarantees were prepared by the respondents' solicitors, Nicholas Fong Wong & Co. and in the case of the guarantees of the three brothers they were signed before a legal clerk of the firm, PW2 but not before the attesting lawyer, PW4. PW2, however was not able to recollect whether the three disputed guarantors signed their respective guarantees in her presence. On balance since one of the securities agreed upon by the parties was the personal guarantees of the directors, it is highly improbable that the loans would be granted to the companies, had the directors not executed the guarantees.

[9] Since the father had passed away on 10 April 1994, his son, Poh Thian Hui testified and identified that the signatures in Chinese characters against his father's name do not belong to his father. He explained that his father had, since 1982, suffered a series of minor strokes that left the right side of his body weak. As he was a right handed person, he was not able to use his right hand to write. The learned judge made the following observations.

> A passport of Poh Kim Chuan, issued on December 29, 1992, and bearing his thumb-print was produced presumably to back up the testimony that the said Poh Kim Chuan could not sign but documents executed by Poh Kim Chuan around the date of December 7, 1984, which he surely must have executed were not produced. Such documents would surely have established whether at that time Poh Kim Chuan was thumb-printing the documents rather than signing. As for the opinion of Poh Thian Hui that the signature is not that of his father, I do not find it acceptable in the absence of confirmation by a handwriting expert. If his father was at that time unable to sign as he claimed, there must surely be documents which the father had thumb-printed at that time, as he had done in the passport, which would support the allegation that the father could not sign but none was produced and the absence of such documents belie the assertion of Poh Thian Hui that his father could not sign. Furthermore, one of the application for the loan bears the Chinese signature of Poh Kim Chuan and this signature is accepted as genuine (see exhibit PA2). I have compared this signature with his signatures appearing in the relevant guarantees and I find them to be similar. An allegation as serious as forgery requires proof to a high degree of certainty and the evidence of a handwriting expert would certainly be the minimum requirement in this case but such was not forthcoming.

> Poh Thian Hui knew the father had to sign the guarantee and he said it was left to Poh Teng Hing to get the Disputed Guarantors to sign. **It is very significant that Poh Thian Hui had not once in his testimony said the father did not agree to sign the guarantees.** Poh Teng Hing, who, according to Poh Thian Hui, was responsible for getting his father's signature, did not testify and he would have been able, since he was responsible for getting the signature of the father, to tell the Court whether he had approached the father and whether the father had refused to sign. In the absence of evidence that the father did not agree to sign the guarantees, it must be that the father had agreed. If the father had agree to the guarantees, which I find, in the absence of evidence to the contrary, the signature cannot be a forgery even assuming that the father had not signed it because it must have been signed by someone with his authority. That being the case, the signature cannot be a forgery. (emphasis added)

[10] As to the testimonies given by the other two disputed guarantors, Ong Seng Tian, (who also signed in Chinese characters) and Vun Nget Len; the learned judge found that they merely denied that the signatures appearing in the guarantees do not belong to them. They however had testified that they had not agreed to give the guarantees and as for supplying their specimen signatures to the court, the learned judge again relied on the evidence of Poh Thian Hui and made the following remarks.

> Poh Thian Hui, who had Chinese education up to primary 5 but sat for the Cambridge School Chinese paper, was asked his opinion as to the difference in the specimen signatures compared to that of the guarantees. He talked about the different strength and strokes of the various signatures and he gave his opinion that the signatures on the guarantees concerned are not the same as those signed by Ong Seng Tian and Vun Nget Len. Again, a handwriting expert was not called. I have myself compared the specimen signatures with those of the guarantees and also with those of the passports and they are similar. I, therefore, cannot accept the opinion of Poh Thian Hui, whose opinion is very much influenced by the fact that it is in his interest to establish forgery since it is his defence that he is relieved from liability under the guarantees because the signatures are forged. The evidence of a handwriting expert who would be a disinterested party should have been called by the defence. I have my doubt whether there was really forgery. Who would benefit from forging the signatures of these two persons? That question was put to Poh Thian Hui and he suggested that it would be the developer, who had since passed away since he had wanted badly to sell the

properties. This is only probable if there is evidence to say that Poh Kim Chuan, Ong Seng Tian and Vun Nget Len had been approached to execute the guarantees but had refused but there is no such evidence.

[11] Another reason given by the learned judge why he could not accept the signatures of the disputed guarantors to be forgeries is the absence of a police report. None of the guarantors lodged a police report which "would have resulted in the examination of the signatures on the impugned guarantees with those of the Disputed Guarantors and the truth would have been revealed. Poh Thian Hui explained, after being asked why the alleged forgery was not reported, that it was left to the lawyer. That to me is hardly an explanation. I am of the view that they did not report to the police and have not even now procure the opinion of a handwriting expert is probably because an expert examination of the signatures concerned would or may reveal the signatures to be genuine."

[12] The findings of the learned judge are all findings of fact based on the evidence of the witnesses who testified before him. We therefore see no reason to interfere with his findings as we consider them to be well founded and justified under the circumstances of this case. The allegation of forgery had not been proven by the appellants and they therefore cannot absolve themselves from their liabilities as guarantors to the various loans that had been extended to the companies of which they are the directors.

[13] Finally I come to the finding of the court below as to the amount due and owing by the appellants to the respondents. The judge's finding is attacked on the ground that the judge did his own calculation as to the quantum and not on the various amounts as agreed to by the parties. That objection cannot be correct as firstly he accepted the undisputed evidence of PW5, the respondents' Credit Manager. If indeed there has been prior agreement between the parties as to the quantum what was the necessity of calling PW5 to take the stand? In this respect I can do no better than to quote the judge's finding on PW5's testimony who "gave evidence of various sums which he saw from entries made in ledgers but the ledgers were not produced. Apart from that, the undisputed documentary evidence show the amounts of the four loans that were released to the developer for

A the account of the companies and the loan agreements, cl. 6, clearly spell out the interest payable and the mode of calculation of the interest. Interest is a matter of mathematical calculation which this witness had given evidence and his evidence relating thereto is not hearsay evidence."

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[14] The appellants did not object to PW5 being called as a witness and they must have agreed to the manner in which the various credits and debits were proved. In dealing with the appellants' conduct, they learned judge had this to say.

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> Having so consented, the defence cannot now turn around to say that those evidence are inadmissible. If the defence had objected timeously, the Plaintiff could possible have produced all the ledgers and then lead evidence to explain, every item in the ledgers relating to the debits and credits that finally produce the amounts
> D owing by the Companies. Additionally and in so far as the Companies are concerned, the consent to waive the technical rules of evidence can be inferred in the present case also because the Companies did not at the close of the case for the Plaintiff submit that the Plaintiff had not proved its case against them and, by electing to call evidence, it must be taken to mean that the
> E Companies had admitted that the Plaintiff had produced some specie of evidence regarding the amounts owing by the Companies as sufficient to establish a *prima facie* case. Therefore, the Companies by accepting that there was *prima facie* evidence must be taken to have consented to the secondary evidence. I am
> F therefore of the view that the Plaintiff had proved the amounts owing by the Companies there being no evidence to contradict the figures.

[15] We see nothing wrong in his reasoning and we see no reason why we should substitute it in the manner as submitted to
G us by the appellants.

[16] Upon our review of the evidence in this case and the judge's findings based on such evidence and the conclusions he had reached we had unanimously dismissed this appeal with costs and
H ordered that the deposit be paid out to the respondents to account of their taxed costs.

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